IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 25, 2008 Session

BRIDGESTONE/FIRESTONE, INC. v. LOREN L. CHUMLEY, COMMISSIONER OF REVENUE FOR THE STATE OF TENNESSEE

Appeal from the Chancery Court for Davidson County
No. 04-1201-III Ellen Hobbs Lyle, Chancellor

No. M2007-00813-COA-R9-CV - Filed June 11, 2008

The trial court denied Plaintiff/Taxpayer's motion to compel discovery of documents that Defendant Department of Revenue asserted were not subject to disclosure under the Taxpayer Confidentiality Act. We granted permission for interlocutory appeal under Rule 9 of the Rules of Appellate Procedure. We vacate the trial court's order and remand for further proceedings.

Tenn. R. App. P. 9 Appeal by Permission; Judgment of the Chancery Court Vacated; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J. and FRANK G. CLEMENT, JR., J., joined.

Michael G. Stewart and Brett R. Carter, Nashville, Tennessee for the appellant, Bridgestone/Firestone, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter and Mary Ellen Knack, Senior Counsel, for the appellee, Loren L. Chumley, Commissioner of Revenue for the State of Tennessee.

OPINION

This interlocutory appeal requires us to construe the extent to which Tennessee Code Annotated § 67-1-1701, *et seq.*, ("the Confidentiality Act") requires the Department of Revenue/the Commissioner of Revenue ("the Department") to disclose documents in its possession in response to a Plaintiff/Taxpayer's discovery request in an action for refund of taxes by the Plaintiff/Taxpayer. Plaintiff/Taxpayer Bridgestone/Firestone, Inc. ("Bridgestone") manufactures tires, tire components, and shock absorbers. Following an audit in 2002 ("the 2002 audit") for the tax period December 1,

1995,[1] through July 31, 1999, the Department assessed sales and use tax, franchise and excise taxes, plus interest, against Bridgestone in an amount exceeding $2,000,000.[2] An informal taxpayer conference was held sometime prior to August 2002. The parties apparently dispute the outcome of that conference. Bridgestone asserts the Department upheld the assessment in its August 2002 decision letter. The Department, however, asserts that as a result of the conference, portions of the audit were adjusted in favor of Bridgestone, and that additional credits were given. In January 2003, Bridgestone paid taxes in the amount of $2,131,373. In October 2003, Bridgestone filed a claim for refund with the Department, seeking a refund in the amount of $3,103,462.

In its refund claim, Bridgestone asserted that a part of the assessment was barred by the statute of limitations; that a portion of the assessment included services that are exempt from taxation; that one sales account included in the assessment had been subject to a prior audit and, therefore, should not have been subject to an additional assessment; and that a portion of the assessment included sales tax on sales destined for out of state and not subject to Tennessee sales tax. The Department denied Bridgestone's refund claim by letter dated October 20, 2003. In its October letter, the Department stated, "[t]he four issues presented as the basis of the claim for refund were addressed in the conference decision letter dated August 21, 2002. The Department's position as stated in the conference decision letter remains unchanged."

In April 2004, Bridgestone filed an action for refund against the Commissioner of Revenue in the Chancery Court of Davidson County pursuant to Tennessee Code Annotated § 67-1-1802(c)(1). Bridgestone filed an amended complaint in February 2006, seeking a refund in the amount of $2,105,172, costs, and attorney's fees. In its amended complaint, Bridgestone asserted that its October 2003 claim for refund in the amount of $3,103,462 included the audit assessment "and additional amounts paid to the Department." In Count One of its amended complaint, Bridgestone asserted it was entitled to a refund of sales and use taxes in the amount of $1,162,234 for "sales in interstate commerce," including a credit for taxes collected and remitted to states other than Tennessee. In Count Two of its amended complaint, Bridgestone further asserted it was entitled to a refund in the amount of $2,035 for taxes allegedly assessed on tax-exempt repair services. Finally, in Count Three of its amended complaint, Bridgestone asserted it was entitled to a refund of franchise and excise taxes, plus interest, in the amount of $940,903 assessed against sales and use tax account number 1002545502, which Bridgestone asserted had been subject to a prior audit in

[1] In its amended complaint, Bridgestone asserted the audited period was December 1, 1991 though July 31, 1999. In its answer, however, the Department, asserted the audited period was December 1, 1995, through July 31, 1999. Documentation contained in the record indicates the audited tax period was December 1, 1995, through July 31, 1999.

[2] We are unable to ascertain the exact amount of the assessment resulting from the audit from the pleadings contained in record transmitted to this Court on appeal. It appears from correspondence included in the record, however, that the audit resulted in an original assessment in the amount of $2,678,684.71.

October 1997.[3] In Count Three, Bridgestone asserted "[s]ales included in the current audit for the period of December 1, 1995, through October 31, 1997, should have been excluded from the current assessment because these sales are covered by the previous audit." Bridgestone did not indicate whether the alleged previous audit of the account included an assessment of taxes specific to that account or to what extent, if any, it had paid taxes assessed on that account. Additionally, Bridgestone cited no law to substantiate its implicit assertion that the Department was, as a matter of law, prohibited from re-auditing the tax account.

The Department answered in March 2006. In its answer, the Department admitted that Bridgestone had filed a claim for refund in the amount of $3,103,462, and asserted that Bridgestone had paid taxes in the amount of $2,131,373. The Department asserted it was "without sufficient knowledge to admit or deny what 'additional amounts' plaintiff seeks to have refunded." The Department denied Bridgestone's claim that it was entitled to a refund under any of the counts asserted in Bridgestone's amended complaint. With respect to Count Three of Bridgestone's amended complaint, the Department specifically denied Bridgestone's allegations that account number 1002545502 was included in the Department's October 1997 audit and should have been excluded from the 2002 audit.

In May 2006, the Department responded to Bridgestone's first set of interrogatories, requests for production of documents, and requests for admissions. In its response, the Department asserted that some of the documents requested by Bridgestone were not subject to discovery/disclosure pursuant to the Confidentiality Act. The Department asserted the Confidentiality Act in response to the following requests/interrogatories:

> Interrogatory No. 4: Identify internal correspondence of the Department regarding the October 1997 audit of Bridgestone/Firestone, Inc. that is not included in the audit work papers for that audit.
>
> Request for Production No. 3: Please produce copies of all auditor's work papers, not otherwise produced in response to another Request for Production, and all documents in the file of the Department relating to the Plaintiff's liability for any time period.
>
> Request for Production No. 4: Please produce copies of all auditor's work papers and all documents in the file of the Department of Revenue relating to the taxes at issue in this litigation.
>
> Request for Production No. 10: Provide all documents, including notes, relating to any conversation participated in by employees, representatives, or agents of the Department relative to Plaintiff's sales and use tax liability from December 1, 1991 to the present.

[3] In its amended complaint, Bridgestone abandoned its claim for a refund in the amount of $998,290 for a portion of the assessment which it previously had asserted was barred by the statute of limitations.

Additionally, the Department asserted that some documents that potentially would be included in Bridgestone's broad requests, exemplified by interrogatory number five, which sought "every document relevant to this litigation of which you are aware," sought documents protected by the Confidentiality Act. In its response, the Department asserted that "the audit papers from December 1, 1993, through October 31, 1997, audit and the audit at issue in this litigation will show that account #1002544502 was not audited in the December 1, 1993, through October 31, 1997, audit." In September 2006, the Department produced a "Privilege Log" identifying the nature of 86 documents withheld from its response to Bridgestone's discovery requests. The documents identified by the Department included memos and emails between Department employees discussing Bridgestone's tax returns and invoices; memos and emails discussing meetings between Bridgestone and the Department and preparation for those meetings; field audit information; drafts of correspondence; internal emails discussing the 1997 and 2002 audits and reviews of those audits; and various letter rulings and technical bulletins.

In January 2007, Bridgestone filed a motion to compel discovery of the documents withheld by the Department. In its motion, Bridgestone asserted it sought to compel discovery of documents "directly related to the audit, informal taxpayer conference or claim for refund of Plaintiff." It further asserted the Department had wrongly identified the documents as "tax administration information" protected from disclosure under Tennessee Code Annotated § 67-1-1701 *et seq*, and that "[a]t most, the information requested is 'tax information' that is subject to disclosure to the Plaintiff/taxpayer in a lawsuit brought by the taxpayer." In its memorandum in support of its motion, Bridgestone asserted:

> Plaintiff merely seeks to discover information that would allow Plaintiff to respond to Defendant's contention that Plaintiff was not impermissibly subjected to multiple audits of the same tax period . . . documentation withheld by Defendant pursuant to tax administration information privilege may be relevant to the claim that there were multiple audits of the same tax period. . . it is contrary to the clear import of the taxpayer information privileges for the Defendant to withhold documentation related to a taxpayer under Tennessee Code Annotated § 67-1-1701, *et seq.*, as part of a lawsuit in which that very taxpayer is challenging the amount of tax that it owes.

Bridgestone asserted that the withheld documents constituted "tax information" as defined by Tennessee Code Annotated § 67-1-1701(8), that the information sought pertained specifically to the taxpayer seeking it, and that the Department was required to disclose the information under Tennessee Code Annotated § 67-1-1703(a).

The Department filed its opposition to Bridgestone's motion to compel in January 2007. In its opposition motion, the Department asserted that it had made files consisting of approximately 4,000 pages available to Bridgestone in addition to the privilege log identifying 86 documents it asserted were prohibited from disclosure under section 67-1-1701, *et seq.* The Department further asserted that it had reconsidered the privilege log and voluntarily had produced seven of the 86 documents originally withheld. The Department additionally asserted that five of the withheld documents consisted of conference letters or letter rulings involving unrelated taxpayers that were

protected tax information. The Department noted that it appeared from Bridgestone's memorandum that it was not seeking these documents. The Department asserted that the remaining 72 documents were protected from disclosure as tax administration information or protected tax information. The Department classified the documents as belonging to five categories: 1) email discussing the status of the refund claim and/or informal conference; 2) handwritten notes of Department employees; 3) email and memoranda discussing the basis of the assessment, adjustments to the assessment, documents produced in connection with the audit, refund claim, informal conference and issues raised in the conference; 4) forms created or used by the Department in connection with the audit; 5) one email discussing decisions and rulings involving other taxpayers. With respect to the third category, the Department noted that it had produced any documents containing calculations of the amount of tax liability or assessment adjustments. The Department asserted that the first four categories constituted confidential tax administration information, and that email contained in the fifth category was prohibited from disclosure under section 67-1-1702 as tax information concerning another taxpayer.

The trial court issued its order denying Bridgestone's motion to compel in February 2007. In its order, the trial court determined that the documents withheld by the Department come within the definition of tax administration information under section 67-1-1703(a) and were, therefore, prohibited from disclosure. The trial court determined that "'data' is the touchstone of the meaning or sense of 'tax information'" which the Department was required to produce under the Code, and found that the "underlying data used by the Commissioner to arrive at its position in this case have been produced." The trial court also noted that "[t]he common thread which the Commissioner asserts as the basis for the privilege as to each document is that it contains interdepartmental mental impressions, analyses, and deliberations of the bases of the plaintiff's tax liability."

In March 2007, Bridgestone moved for an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. In its memorandum in support of its motion for interlocutory appeal, Bridgestone asserted that its discovery demand "attempted to explore, among others, the question of whether Plaintiff had in fact been subjected to multiple audits for the same tax period by the Department of Revenue." It asserted that the documents it sought were not protected from disclosure as "tax administration information" under Tennessee Code Annotated § 67-1-1701, *et seq.*, and that an interlocutory appeal was necessary and warranted to achieve uniformity of law on the issue of the nature and scope of the information that is protected or prohibited from disclosure under the statute. Although the Department asserted the trial court's denial of Bridgestone's motion to compel discovery was correct, it did not oppose the motion for interlocutory appeal. The trial court granted Bridgestone's motion in April 2007, and we granted permission for interlocutory appeal in May 2007. We now vacate the trial court's order denying Bridgestone's motion to compel discovery and remand for further proceedings.

Issue Presented

This Court's order granting permission for interlocutory appeal did not certify an issue for appeal, but stated that Bridgestone's Rule 9 application

> concern[ed] a discovery dispute between a taxpayer and the Commissioner of Revenue over certain documents which the Commissioner asserts constitute tax administration information and are thus privileged pursuant to Tenn. Code Ann. § 6[7]-1-1702. The taxpayer . . . filed a motion to compel [discovery] asserting that the documents do not fall within the definition of tax administration information and, even if they do, production of the documents is mandated by Tenn. Code Ann. § 6[7]-1-1703(a).

In its brief to this Court, Bridgestone presents the issue as:

> Whether the Chancery Court erred in denying Appellant's motion to compel the production of documents withheld by the Commission of Revenue under the guise of the taxpayer confidentiality statutes set forth in Tenn. Code Ann. § 67-1-1701 *et seq.*, where the subject documents were related to the audit, assessment and informal taxpayer conference of the very taxpayer at issue in this case, Bridgestone/Firestone, Inc.

The Department, on the other hand presents the issue as:

> Whether the Chancery Court properly denied Bridgestone/Firestone's motion to compel the discovery of internal Department of Revenue notes, e-mails, memoranda and forms containing tax administration information that is prohibited from disclosure by the Taxpayer Confidentiality Act.

The issue presented by this appeal, as we perceive it, is:

> Whether the trial court erred in denying Plaintiff/Taxpayer's motion to compel discovery where the trial court determined that internal, taxpayer-specific Department of Revenue notes, e-mails, memoranda, and forms did not constitute tax information under Tennessee Code Annotated § 67-1-1701, *et seq.*

Standard of Review

We review a trial court's decision regarding pre-trial discovery matters under an abuse of discretion standard. *Benton v. Snyder*, 825 S.W.2d 409, 416 (Tenn. 1992). The appellate courts will find an abuse of discretion "when the trial court applies an incorrect legal standard or reaches a conclusion that is 'illogical or unreasonable and causes an injustice to the party complaining.'" *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)(quoting *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006)(citing *Howell v. State*, 185 S.W.3d 319, 337 (Tenn. 2006))). Moreover, "discretionary choices are not left to a court's inclination, but to its judgment; and its judgment is to be guided by sound

legal principles." *BMG Music v. Commissioner*, No. M2007-01075-COA-R9-CV, 2008 WL 2165985, at *6 (Tenn. Ct. App. May 16, 2008)(quoting *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)(quoting Martha S. Davis, Standards of Review: Judicial Review of Discretionary Decisionmaking, 2 J. App. Prac. & Process 47, 58 (2000) (citations and internal quotation marks omitted))). An abuse of discretion may be found "'when the trial court has gone outside the framework of legal standards or statutory limitations, or when it fails to properly consider the factors on that issue given by the higher courts to guide the discretionary determination."' *Id.* (quoting 2 J. App. Prac. & Process at 59).

This appeal also requires us to review the trial court's construction of the definition and scope of discovery of "tax information" contained in Tennessee Code Annotated § 67-1-1701, *et seq.* The court's role when construing a statute is well-settled. The court's primary purpose when construing a statute is to ascertain and give effect to the intention and purpose of the legislature. *McLane Co., Inc. v. State of Tennessee*, 115 S.W.3d 925, 928 (Tenn. Ct. App. 2002) *perm. app. denied* (Tenn. May 27, 2003)(citations omitted). The meaning and intent of a statutory section is to be ascertained in light of the general nature and purpose of the statute as a whole, and not from the special or singular words in a sentence or section. *Id.* Insofar as possible, the legislature's intent is to be ascertained from the natural and ordinary meaning of the language employed by the legislature, without a forced or subtle interpretation that would limit or extend the statute's application or purpose. *Id.* The court should seek to avoid a construction that would result in a conflict between statutes. *Id.* Accordingly, insofar as possible, statutes should be construed so as to provide a harmonious operation of the laws. *Id.* The construction of a statute is a question of law which we review *de novo* with no presumption of correctness attached to the determination of the trial court. *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000).

Analysis

The parties to this interlocutory appeal seek a definitive determination of what constitutes "tax information," which must be disclosed to the taxpayer unless disclosure is "seriously burdensome," as opposed to "tax administration information," which is not subject to disclosure by the Department, as the terms are defined by Tennessee Code Annotated § 67-1-1701(8) & (7), respectively. The code provides, in pertinent part:

> (a) Notwithstanding any provision of law to the contrary, returns, tax information and tax administration information shall be confidential and, except as authorized by this part, no officer or employee of the department and no other person, or officer or employee of the state, who has or had access to such information shall disclose any such information obtained by such officer or employee in any manner in connection with such officer's or employee's service as an officer or employee, or obtained pursuant to the provisions of this part, or obtained otherwise.

Tennessee Code Annotated § 67-1-1702(a)(2006 & Supp. 2007). However, tax information is subject to disclosure to the taxpayer who is the subject of that information. The code provides:

> (a) The commissioner shall, subject to such requirements and conditions as may be prescribed by rules, disclose the return of any taxpayer, or tax information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. Tax information shall not, however, be disclosed to such person or persons if the commissioner determines that such disclosure would be seriously burdensome to tax administration.
>
> . . . .
>
> (b)(6) Tax information with respect to any taxpayer that may otherwise be open to inspection by or disclosure to any person authorized by this subsection (b) to inspect any return of such taxpayer shall not be disclosed if the commissioner determines that such disclosure would seriously impair tax administration.

Tennessee Code Annotated § 67-1-1703(a) & (b)(6)(2006). The code further provides:

> (a) It is a Class E felony for any person who has, or had at any time, access to any return or tax information to disclose to any person, except as authorized by law, any such return or tax information. If such offense is committed by any officer or employee of the state, the officer or employee shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

Tennessee Code Annotated § 67-1-1709 (2006). Thus, although tax information and tax administration information are confidential, tax information must be disclosed to the subject taxpayer unless disclosure would be "seriously burdensome to tax administration" or unless "disclosure would seriously impair tax administration." Tax administration information, on the other hand, it not subject to disclosure upon demand by a taxpayer under section 67-1-1703. Under section 67-1-1711, however,

> [t]he commissioner is authorized to disclose tax administration information, other than returns and tax information, if the commissioner determines that such disclosure is in the best interests of the state; provided, that no provision of law shall be construed to require disclosure of criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards, if the commissioner determines that such disclosure will impair assessment, collection, or enforcement under state tax laws.

Tennessee Code Annotated § 67-1-1711.

The code defines "tax information" as:

> (8) "Tax information" means a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tennessee Code Annotated § 67-1-1701(8) (2006). The statutory definition of "tax administration information," on the other hand, is:

> (7) "Tax administration information" means criteria or standards used or to be used for the selection of returns or persons for audit or examination, or data used or to be used for determining such criteria or standards; audit procedures; and any other information relating to tax administration[.]

Tennessee Code Annotated § 67-1-1701(7) (2006). "Tax administration," in turn, is defined as:

> (6) "Tax administration" means the administration, management, conduct, direction, and supervision of the execution and application of the state tax laws, rules, or related statutes or rules and reciprocity agreements with the several states or federal government to which the state of Tennessee is a party. "Tax administration" also means the development and formulation of state tax policy relating to existing or proposed tax laws, related statutes and reciprocity agreements and includes assessments, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, rules or reciprocity agreements[.]

Tennessee Code Annotated § 67-1-1701(6) (2006).

Bridgestone's argument, as we perceive it, is that any document that is "taxpayer specific" or relates to a particular taxpayer is "tax information" as defined by section 67-1-1701(8) and is subject to disclosure under section 67-1-1703. Bridgestone asserts in its brief to this Court, that

> "tax administration information" as used in the taxpayer confidentiality statutes . . . neither extends to nor includes information that is specific to a particular taxpayer's audit results, tax assessment and/or informal taxpayer conference, when the subject

> taxpayer is the person requesting the documents . . . "tax administration information" includes 'criteria or standards' used by the Department of Revenue to select returns or persons for audit or examination, or "data" used by the Department of Revenue for determining such criteria or standards.

Bridgestone further asserts that although the definition includes "audit procedures," it "does not include the application of those audit procedures to a particular taxpayer." Bridgestone asserts that the trial court erred when it determined that the term "application of state tax laws" included in the statutory definition of tax administration information includes any documents that relate to a specific taxpayer. Bridgestone contends that to construe tax administration information as including any documents relating to the application of the tax laws to a specific taxpayer potentially converts virtually all information to information that is not subject to disclosure under the statutes. Finally, Bridgestone asserts that it is not seeking "general internal Department communications that involve tax policy or audit criteria," but "merely . . . information to determine the basis of the assessment of . . . tax" assessed against it.

The Department, on the other hand, asserts the Confidentiality Act has two primary purposes: to protect the confidentiality of taxpayer information from anyone other than the taxpayer and to protect tax administration information that is "created by the Department of Revenue in the course of its administration of the State's revenue laws." It contends that within the statutory provisions, the legislature specifically recognized that tax administration information included a broad spectrum of information, including a "variety of state Revenue procedures and functions, including 'assessments, collections, enforcement, litigation, publication and statistical gathering.'" The Department asserts the documents withheld from Bridgestone were created in the course of the Department's "procedures for assessing taxes, conducting informal conference proceedings, and evaluating the refund claim that gave rise to this litigation." It further asserts that many of the documents "concern the development and formulation of state tax policy relating to existing tax laws." It argues, furthermore, that the formulation of tax policy does not happen in a "theoretical void," but arises within the context of the Department's consideration of facts involving a specific taxpayer. It asserts the Confidentiality Act plainly protects the internal notes, communications and forms at issue in this case, and that to hold otherwise would stifle the ability of its employees to engage in frank, open communication.

In its brief to this Court, the Department additionally asserts that it "disputes Bridgestone/Firestone's claim that an earlier audit of Bridgestone/Firestone somehow precluded the Commissioner from making the assessment that is at issue in this case." It asserts that Bridgestone already has, among the 4000 pages of documents produced by the Department, all of the reports and documentation that relate to the earlier audit. The Department contends that any discussion that may have occurred within the Department with respect to the significance of the prior audit are irrelevant to Bridgestone's claim and are protected from disclosure as tax administration information. The Department cites *Tennessee Farmer Assurance Co. v. Chumley*, 197 S.W.3d 767 (Tenn. Ct. App. 2006), for the proposition that, as a matter of law, statements reflecting employees' interpretations of the tax law can have no effect on how the law is interpreted by the courts. It asserts the legal

theories that may have been briefly discussed are irrelevant to the determination of Bridgestone's tax liability, and that Bridgestone has been provided with all the data necessary to determine the basis of the liability assessed against it. The Department asserts that trial court correctly held that "[i]nterdepartmental impressions, analyses and deliberations are actions taken in the management and conduct of the execution and application of the state tax law," and that "'data' is the touchstone meaning or sense of 'tax information'" that is subject to disclosure under the statutes.

As noted above, the trial court denied Bridgestone's motion to compel upon determining that the documents withheld by the Department constitute tax administration information. The trial court determined that all "the underlying data used by the Commissioner to arrive at its position in this case [had] been produced." The court determined that the withheld documents contained interdepartmental mental impressions and deliberations of Bridgestone's tax liability. The trial court concluded that tax administration information is "information dealing with the administration and policies developed by the Department of Revenue in executing and applying the state tax laws." It further concluded that "'data' is the touchstone of the meaning or sense of 'tax information'" because the legislature used "data" as a "catch-all term . . . to refer to the information the section covers." The court stated, "while it is correct, as the plaintiff argues, that section 67-1-1701(8) requires disclosure to the taxpayer of information specific to the taxpayer, the section narrows the scope of the disclosure by adding the limitation that the information, even if taxpayer specific, must be data." The court noted that the documents at issue do not fit neatly into the statutory definition of tax information or tax administration information because they are neither "the kind of general, policy information one envisions as administrative documents developed by the Department" nor "data, the touchstone term contained in the definition of 'tax information.'" The court held that the documents are "more closely aligned with administration policy developed by the Department than they are data concerning the taxpayer and his tax liability," however, where they consist of inter-Departmental deliberations and not the underlying data upon which Bridgestone's tax liability was based.

We begin our analysis of the trial court's order and consideration of the parties' arguments with three observations. First we note that, contrary to Bridgestone's assertion to this Court that the documents withheld by the Department contain information necessary to determine the basis of the tax assessment against it, Bridgestone appears to possess all the data and information upon which the Department based the 2002 tax assessment. Bridgestone's argument in the trial court, insofar as it pertains to the issue presented by this appeal, was that account number 1002544502 was "impermissibly subjected to multiple audits of the same tax period." Accordingly, the disputed issue that precipitated this interlocutory appeal, as we perceive it, is whether account number 1002544502 was included in the 1997 audit in addition to the 2002 audit.

Second, we note that Bridgestone's argument with respect to this issue potentially raises both a question of law and a question of fact. Bridgestone's argument that it was "impermissibly subject to multiple audits" suggests that, as a matter of law, the Department may not twice audit a tax account for a particular tax period. Although Bridgestone cites neither statutory nor case law to support this contention, its entire argument appears to be predicated on an assertion that if tax

account number 1002544502 was included in the 1997 audit, the Department could not lawfully include it in the 2002 audit. We emphasize, moreover, that Bridgestone does not indicate or assert that account number 1002544502 was previously subjected to a tax assessment in 1997; it has not, at this stage of the litigation, asserted that it has been subject to double taxation. This contention presupposes that, as a factual matter, account number 1002544502 was indeed included in the 1997 audit.

The Department's response, as we perceive it, is likewise ambiguous with respect to whether the disputed issue is one of law or fact. On one hand, in its answer and responses to Bridgestone's discovery requests, the Department denies that, as a factual matter, account number 1002544502 was included in the 1997 audit. In its brief to this Court, however, the Department asserts,

> [t]he Commissioner disputes Bridgestone/Firestone's claim that an earlier audit of Bridgestone/Firestone somehow precluded the Commissioner from making the assessment that is at issue in this case. Nevertheless, even if Bridgestone/Firestone has a viable claim, it has in its possession, among the 4000 pages of documents already produced, all of the audit reports and other documents that relate to the earlier audit. Any discussions that may have occurred among Department of Revenue employees as to the significance of the prior audit are irrelevant to Bridgestone/Firestone's claim and are protected from disclosure as tax administration information.

The Department additionally cites *Tennessee Farmers Assurance Co. v. Chumley*, 197 S.W.3d 767 (Tenn. Ct. App. 2006), for the proposition that, "[a]s a matter of law, statements or interpretations of tax laws made by auditors or other Department of Revenue employees can have no effect on the outcome of the legal issues to be decided by the courts."

Third, we observe that the parties and the trial court have devoted considerable attention to the question of what constitutes confidential tax administration information. We note, however, that the code provisions recited above begin with the proposition that both tax information and tax administration information are confidential except as disclosure is otherwise authorized. Tennessee Code Annotated § 67-1-1702(a)(2006 & Supp. 2007). The code then authorizes and indeed requires disclosure to a taxpayer or his designee of that taxpayer's tax return or tax information, subject to the conditions prescribed by the rules. Tennessee Code Annotated § 67-1-1703(a)(2006). Disclosure is neither required nor authorized, however, if the Commissioner determines that such disclosure would be seriously burdensome to tax administration. *Id.* Thus, the issue presented in this case is not whether the documents withheld by the Department are properly classified by the Department as tax administration information, but whether they constitute tax information as defined by Tennessee Code Annotated § 67-1-1701(a)(8)(2006).

Although slight, this distinction is not without a difference in light of the trial court's observation that the documents described in the Department's privilege log do not fit neatly into the statutory definitions of tax administration information or tax information. Unless the documents

sought by Bridgestone are tax returns or tax information, they are not subject to disclosure under section 67-1-1703(a). Thus, whether the documents fit neatly into the definition of tax administration information is less critical to the consideration of whether disclosure is required by section 67-1-1703(a).

As noted above, tax information as defined by the code is

> a taxpayer's identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by, the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax, penalty, interest, fine, forfeiture, or other penalty, imposition or offense, administered by or collected by the commissioner, either directly or indirectly. "Tax information" does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer[.]

Tennessee Code Annotated 67-1-1701(8)(2006). Clearly, insofar as the documents withheld by the Department in this case reflect on the Department's consideration or internal discussion of the question of law presented by Bridgestone, i.e. whether account number 1002544502 may be subjected to multiple audits for the same tax period, they are not tax information. Although such documents may be taxpayer specific, they are specific only insofar as they provide context for what is clearly a discussion of the application of state tax law or policy. The determination of whether multiple tax audits are permissible under the statutes or as a matter of policy is not a taxpayer specific determination. Indeed, to the extent to which the documents pertain to this question of law or policy, we would agree with the trial court that they constitute tax administration information where they are information relating to the application and execution of the state tax laws under Tennessee Code Annotated § 67-1-1701(6) & (7)(2006). Certainly, insofar as the documents withheld by the Department reflect on whether, as a matter of law, any given tax account may be subject to multiple audits for the same tax period, they are not tax information as defined by section 67-1-1701(8).

The question of whether the documents constitute tax information insofar as they reflect the Department's internal discussions regarding whether account 1002544502 was, as a factual matter, included in the 1997 audit, presents a less clear question. Certainly, such documents do not pertain to the taxpayer/Bridgestone's "identity, the nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax collected, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be, examined or subject to other investigation or processing[.]" To the extent to which the documents reflect on the Department's determination of a factual matter relating to an audit of

a taxpayer, they are taxpayer specific and are not excluded from disclosure as "tax information [that] does not include data in a form that cannot, either directly or indirectly, be associated with, or otherwise be used to identify, directly or indirectly, a particular taxpayer." Thus, we turn to whether documents that reflect the Department's consideration or analysis of a taxpayer specific factual matter constitute tax information as "other data . . . recorded by, prepared by . . . the commissioner with respect to a return or with respect to the determination of the existence, or possible existence, of liability, or the amount of the liability, of any person for any tax . . . ." under section 67-1-1701(8).

As the trial court noted, the "touchstone" of this element of the definition of tax information is "data." However, data includes more than the mere numbers upon which an assessment is mathematically calculated. Data is "factual information (as measurements or statistics) used as a basis for reasoning, discussion, or calculation." Webster's Ninth New Collegiate Dictionary 325 (1986). Data is also defined as "[o]rganized information generally used as the basis for an adjudication or decision. Commonly, organized information, collected for a specific purpose." Black's Law Dictionary 395 (6th ed. 1990). Accordingly, to the extent to which the withheld documents reflect the Department's recording or preparation of information used to determine the existence or amount of Bridgestone's tax liability, they are tax information as defined by the code.

If, as Bridgestone asserts, the Department may not subject a specific account to multiple audits for the same tax period as a matter of law, and if the tax assessed pursuant to the 2002 audit included a tax account that was subject to an audit in 1997, then whether, as a factual matter, tax account 1002544502 was included in the 1997 audit is information which was used to form the basis of the assessment of Bridgestone's tax liability. It is "other data . . . recorded by [or] prepared by . . . the commissioner with respect to . . . the determination of the existence, or possible existence, of liability . . . ." under section 67-1-1701(8). Thus, insofar as the documents withheld by the Department contain information used as a basis for the Department's factual determination that account 1002544502 was not included in the 1997 audit, they constitute tax information. We believe this information includes interdepartmental discussions to the extent to which they illustrate how the Department arrived at factual, taxpayer specific determinations necessary to its assessment of the taxpayer's tax liability.

We are not insensitive to the Department's argument in its brief to this Court that its employees must be able to engage in frank and open discussion. Nor do we disagree with the Department's position that the Confidentiality Act seeks to further two important purposes. These purposes, as we perceive them, are 1) to protect the confidentiality of taxpayer information from third parties and 2) to further the Department's ability to formulate tax policy; develop standards, criteria and audit procedures; and administer, manage, and enforce the tax laws. We cannot agree with the Department's position, however, that all internal Departmental communications are protected from disclosure under the Confidentiality Act, including those that reflect the Department's determination of a disputed material factual issue that forms the basis of a tax liability assessment. We also disagree with Bridgestone, however, that all documents that are taxpayer specific in that they refer to a specific taxpayer constitute tax information which must be disclosed to the taxpayer. Documents that reflect interdepartmental consideration of tax policy and the administration or

conduct of tax law, in other words, discussions of questions of law or policy or the administration or application thereof, are not taxpayer specific where the application thereof extends beyond the taxpayer who provides the context for that discussion.

We recognize that Departmental employees must engage in open and frank communication, and that internal communication may contain a mixture of policy discussion and factual determinations. However, assuming Bridgestone is correct that a particular account may not be subjected to multiple audits for the same tax period as a matter of law, disclosure of documents reflecting the Department's determination that, as a factual matter, the account was or was not included in a prior audit does not hamper Departmental discussion of policy-related or administrative matters. Moreover, such information is not only taxpayer specific, but is unrelated to any larger matter of tax administration, policy, standards, or the implementation of the tax laws. Further, even assuming the documents reflect differences of opinion among Departmental employees regarding Bridgestone's liability which, according to the Department, may not be relied upon by Bridgestone under *Tennessee Farmers Assurance Co. v. Chumley*, 197 S.W.3d 767 (Tenn. Ct. App. 2006), they nonetheless constitute information used as the basis for the Department's determination of liability as defined by section 67-1-1701(8). Thus, it is incumbent upon the Department to demonstrate that disclosure would be seriously burdensome should the Department continue to assert that they are nonetheless protected from disclosure under Tennessee Code Annotated § 67-1-1703(a).

We next turn to Bridgestone's assertion that to permit the Department to merely withhold documents as privileged based upon a privilege log potentially permits the Department to decide whether given documents falls within the statutory definition of tax information. Although we do not believe the present case suggests any impropriety on the part of the Department, but an honest difference with respect to the construction of the statutes, we agree that it is the role of the court to determine, based upon an *in camera* review of documents withheld by the Department, whether a particular document is tax information under the code as construed herein. Moreover, upon *in camera* review, the court may find it necessary to redact certain portions of any particular document to exclude from disclosure those portions that do not constitute tax information as construed in this Opinion.

Holding

As noted above, Bridgestone's argument is predicated upon its assertion that account 1002544502 was "impermissibly" subject to multiple audits. This argument presents, first, a question of law regarding whether the Department may subject a particular account to more than one audit for the same tax period. It then presents a question of fact regarding whether the account was included in the 1997 audit. The question of law has not been addressed in the trial court, and to render an opinion on it here would be advisory. We observe, moreover, that at this stage of the litigation, this is not a question of double taxation, but of multiple audits. We further observe that if, as the Department asserted in the trial court, account 1002544502 was not included in the 1997 audit, the question of whether it may be subjected to multiple audits as a matter of law is rendered moot.

In light of the foregoing, the order of the trial court denying Bridgestone's motion to compel discovery is vacated. This matter is remanded for further proceedings consistent with this Opinion. Upon remand, the trial court is instructed to conduct an *in camera* review of the documents withheld by the Department to determine whether, as a matter of law, the documents, in whole or in part, constitute tax information as the term is construed in this Opinion. Cost of this appeal are taxed to the Appellee, Loren L. Chumley, Commissioner of Revenue.

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DAVID R. FARMER, JUDGE